IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 11 of 1985

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.H.WAGHELA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PUSHPABEN JITENDRAKUMAR SHAH & OTHERS

Versus

UNION OF INDIA & OTHERS

Appearance:

1. First Appeal No. 11 of 1985

MR V.C. DESAI, ADVOCATE, for the Appellants
MR.R.M.VIN, ADVOCATE for the Railway
- Respondent No.1
Notice served on the Respondent No.2

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 25/06/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The appellants have challenged the judgement and decree dated 4th May 1984 passed by the learned Civil Judge (S.D.) - Navsari in Special Civil Suit No.28 of 1981 dismissing the suit in which they have prayed for damages to the tune of Rs.1,20,000=00 with interest for the death of Shri Jitendrakumar Somchand Shah, who while travelling by 15th Down Saurashtra express on 30th April 1979 from Maroli railway station to Ahmedabad, was thrown out from the railway compartment while the train was moving between Maroli and Sachin and died as a result of injuries resulting therefrom.

2. According to the appellants-plaintiffs, Shri Jitendrakumar Somchand Shah was issued a ticket on 30th April 1979 by the railway for travelling from Maroli to Ahmedabad by 15 Down Saurashtra Express, and he entered the compartment on the basis of that ticket. According to the plaintiffs, the defendant No.1 was in the practice of issuing the tickets far in excess of the space and capacity of the compartments even though the train guard and station master and other employees had the knowledge about such overcrowding. On 30-4-1979, there was a heavy rush of passengers, but the defendant No.1 did not control or regulate or accommodate them. No steps were taken either for cancelling the excess tickets issued or for making any alternative arrangement for the safe journey of the ticket holders. The defendant No.1 allowed the said train to proceed further. It was contended in the plaint that, because of the excessive issue of tickets, ignoring the permissible capacity of the train compartments or the space available from the stations prior to Maroli station, there was chaos and passengers were "fighting their best to get into the train". The passengers were sitting on joining sections between the two compartments and some were sitting even on outer part of the windows of the compartments and some were holding the rods meant for alighting the compartment. The foot-boards of the compartments were also occupied by passengers and the rule of "might is right" prevailed. The compartments were completely jammed with passengers and "even the air could not reach them". The passengers were in a situation that could be compared with "entangled branches of tress and plants in a forest". It is alleged that there was also mud and

water on the floor of the compartment making it slippery. As soon as the whistle went off, the remaining passengers from outside tried to force their way into the compartment in which Jitendrakumar had entered and though there was no scope for any further entry, the flow continued from the door of the compartment and at that time, the train was already in motion. The passengers from outside continued to enter the compartments from opposite direction through both the doors which were open. Because of the thrusts by the passengers entering the compartment in this manner, the deceased was pushed towards the edge of the door of the compartment and as he struggled to hold himself, his legs slipped and he fell down from the running train while the train was passing by the pole No. 254/6. When Jitendrakumar fell down from the train, the passengers pulled the emergency chain which, as stated in paragraph 11 of the plaint, was not working. The train did not stop until it reached to Udhna station. Some passengers rushed to the driver of the train and the guard and questioned them as to why the train was not stopped though the chain was pulled. Ultimately, Jitendrakumar, who was lying unconscious near the electric pole No. 254/6, was taken to the hospital where he was declared dead. According to the plaintiffs, the accident occurred because of the "fatal careless and negligence" of the railway administration. Jitendrakumar was drawing a salary of Rs.800 per month and was 40 years of age and on that basis, the compensation to the tune of Rs.1,20,000=00 was claimed.

3. In the written statement exh.11, it was contended that the deceased travelled by 15 Down Saurashtra Express for journey towards Ahmedabad from Maroli station "at his own sweet will". It was contended that the allegation regarding issuance of more tickets than the carrying capacity of passengers was baseless, and that, if there was no room in the coaches of 15 Down Saurashtra Express, the deceased could have travelled by any other train on the same day or could have returned the ticket to the Station Master, Maroli and taken the refund of the fare. It was contended that the defendants - railway authority did not force the deceased to travel by the said train. It was then contended that, on 30-4-1979, being a period of school / college vacation and marriage season, there might have been great rush of passengers which fact was known to all passengers due to the experience of such heavy traffic during the vacation. Since there was heavy rush of passengers, the deceased could have travelled by any other passenger train after the departure of Saurashtra Express or could have taken the refund of the fare. It is stated that the defendants could not have

cancelled the train at Maroli or any other station, because, that would have caused other passengers, who were travelling from Bombay, great inconvenience. As regards the slippery floor, it was contended that some passengers might have thrown water in the compartment and that would be the negligence of those passengers and not of the railway. It is also contended that the deceased fell down from the train while standing near the door which was an act of gross negligence on his part and that, "because of the heavy rush, he must have fallen down from the compartment" (paragraph 13). If the deceased had taken a wise step of either travelling by a less crowded passenger train or getting his ticket cancelled, the said incident would not have happened. It is stated that the railway administration had full sympathy for the plaintiffs, but no legal right had accrued to claim any compensation in their favour. It was also contended that the railway administration was bound to provide accommodation only to passengers travelling in reserved coaches and since the deceased was travelling without reservation, availability of accommodation could not be guaranteed. According to the railway, the deceased died due to gross negligence on his part by entering in an already crowded compartment and thereafter, standing near the door knowing full well that it was dangerous to stand near the door in a running train. It is denied that the minimum standard of safety was not being observed by the defendants and it is alleged that since the deceased died due to his own negligence, the question of safety standards to be observed by the defendants did not arise.

4. The learned trial Judge held that the plaintiffs proved that the defendants - railway authorities issued "many more tickets than the capacity allowed" for 15 Down Saurashtra Express on 30th April 1979, and that the train was allowed to proceed further. It was also held that the railway administration had issued ticket exh.20 to Jitendrakumar Somchand Shah at Maroli station. However, on issue No.3, it was held that the plaintiffs did not prove that Jitendrakumar met with an accident which resulted in his death because of the negligence and careless of the railway authority. It was held that the defendants had proved that the deceased had met with the accident due to his own negligence, and that the railway was not bound to provide accommodation to all passengers who bought tickets. The trial Court held that the ordinary fact known to the deceased and the railway authorities at the time of issue of ticket to the deceased at Maroli railway station was that the trains were usually overcrowded and the deceased tried to travel

by that train already knowing that he was not to get any seat in the compartment, and that he may have to travel standing on the foot-board. The deceased, having known this fact at the time of purchase of ticket by him and at the time of travelling, had to face the consequences of such travel. He could have selected not to travel by that train and could have surrendered the ticket and claimed the refund. The trial Court held that the evidence disclosed that the deceased was travelling standing just at the entrance of the compartment or standing on the foot-board and was hit by an electric pole which resulted into his death and in this, no negligence of the railway or its employees was disclosed so as to make it liable for the consequences. The learned trial Judge held that the railway company is not bound to carry passengers safely and securely at all events, but to take all reasonable care in the management of their trains so that the passenger is not exposed to undue danger. There is no obligation on the part of the railway to carry passengers safely, but it is only to carry them with reasonable care and diligence. It was held that the contract of a railway company with a passenger is not that of an insurer, but simply to take sufficient care and to use due diligence in providing materials for engine carriages and so on for the passage of the passengers. It was held that even if it was found that the deceased was hit by any of the poles erected at a distance of 2.1/2 feet to 3 feet from the compartment, it would not be the case of negligence of the railway authority. The learned trial Judge observed: "People met with their deaths only travelling against the rules by standing on foot-board or travelling hanging, having caught rod at the entrance to the compartment". The learned trial Judge, therefore, held that the plaintiffs were not entitled to get Rs.1,20,000=00 as damages.

5. The learned counsel for the appellants submitted that there was a duty cast on the railway to see that the compartments should not be overcrowded. He submitted that, under Section 63 of the Indian Railways Act, 1890 (which was applicable in the instant case, since the accident occurred prior to the coming into force of the Railways Act, 1989), the railway administration was bound to fix and display the maximum number of passengers that may be carried in each compartment of every description of carriage. It was submitted that, under Section 47(1)(b) of the said Act, the Central Government was required to make general rules consistent with the Act for providing for the accommodation and convenience of passengers and regulating the carriage of their luggage. It was submitted that if the provision of section 63 were

not complied with, the railway was liable to be punished under Section 93 of the Act for contravention thereof. It was also argued that, if any railway servant, when on duty, endangers the safety of any person by disobeying any general rule or by any negligent act or omission, he was liable to be punished with imprisonment for a term which may extend to two years, under Section 101 of the Act. The learned counsel argued that, under the General Rules framed under Section 47, certain precautions were required to be taken before starting the train and the guard in charge of the train could not have given any signal for starting the train from the station until he had received the permission from the station master and the station master could give permission only when all was right for the train to proceed, as provided under Rules 114 and 115. He submitted that, under Rule 163, it was duty of every railway servant to see that every exertion is made for ensuring the safety of the public, and, every railway servant who observes any unusual circumstances likely to interfere with the safe running of trains, or the safety of the public and was required to take immediate steps to prevent the accident. Under Rule 138, every guard is required to give his best assistance to passengers entraining and detraining. It was therefore submitted that, looking to the provisions of Section 63 read with Section 93 of the Act and the Rules, it was the duty of the railway not to allow the passenger compartments to become overcrowded and that, in order to prevent overcrowding, the railway owed a duty to take a reasonable care and steps to prevent the compartments from becoming overcrowded. It was submitted that exhibiting maximum number of seats thereon implied that no excess passengers could be allowed. It was also submitted that the railway ought to have foreseen the natural and probable outcome of such overcrowding. The learned counsel submitted that, by issuing excess tickets with full knowledge that the train in question was overcrowded, the administration acted negligently, because, it could have foreseen the outcome of such excess issuance of the tickets which resulted in the overcrowding of the compartments.

5.1 The learned counsel relied upon the following decisions in support of his submissions :

[a] The decision of the Supreme Court in A.V.Raju v. State of Orissa reported in AIR 1974 SC 1350, was cited to point out that, in the context of Section 101 of the said Act, the Supreme Court held that, where an engine driver in driving the

engine backwards disobeyed a red signal and also took the engine beyond the authorized point, which resulted in collision with a goods train, he was guilty of endangering his own safety and the safety of the crew of the other train, and he thereby acted in a rash and negligent manner.

[b] The decision of the Supreme Court in Ulahannan Rajan v. Union of India reported in AIR 1992 Kerala 230, was cited to point out that, in a case where the passenger was getting down from the compartment holding the third child in her hand and the train started moving, as a result of which, she and her child fell down, and, by the time her mutilated body was removed from under the train she had breathed her last and the child also succumbed to the injuries on the way to the hospital, the Court held that it was too much to believe that the employees of the railway were not aware of the fall on that day. The passenger fell while the train began to move after stopping at the station for some minutes. It was held that the evidence suggested that the guard, the driver and other employees had not bestowed the care expected from them and were negligent in their duties. The employees had an additional duty to see that all passengers had got down from the compartment and all intending passengers had got into the train. The Court referred to the Rules 150, 120, 130, 131 and 137 of the General Rules framed under Section 47 of the Act, and also to the decision in Taylor v. Manchester, Sheffield and Lincolnshire Rail Co., (1891-1894) All ER Rep 857, in which it was held that, even though the plaintiff had entered into a contract with the defendants by taking a ticket, his action for personal injury caused by the negligence or misfeasance of the defendants' servant was an action "founded on tort" and not one, "founded on contract"."

[c] The decision of the Patna High Court in Union of India as Owner of O.T. Rly. v. Shri Nivas Mal Bairogiya, reported in AIR 1955 PATNA 282, was cited for the proposition that the question if overcrowding by itself amounted to actionable negligence, will depend upon the duty arising out of the contract and must depend upon the ordinary facts known to the contracting parties at the time of the contract.

[d] The decision of the Madhya Pradesh High Court in United India Insurance Co. Ltd. v. Babulal, reported in (1993) ACJ 1100,, which was rendered in the context of the award of the Motor Accident Claims Tribunal, was cited to point out that where the motor bus was overloaded and some passengers were allowed to travel by standing at the door and it was because of the excessive speed that the deceased, who was allowed to stand at the back door, slipped and died, it was held that the bus driver was rash and negligent in causing the accident.

6. The learned counsel appearing for the railway submitted that the relationship between the passengers and the railway administration was purely contractual, by which the passenger is taken for travel for payment. It was submitted that, under Section 67(1) of the said Act, it was provided that fares shall be deemed to be accepted and tickets to be issued, subject to the condition of there being room available in the train for which the tickets are issued and that if there is no room available therein, there was a provision for refunding the amount of fare under sub-section (2) of Section 67 if the ticket was returned within three hours after the departure of the train. It was, therefore, submitted that the railway was not under any obligation to provide accommodation to the passengers and that if the train was overcrowded, the passenger ought to return the ticket and get the refund of his fare. It was argued that if, notwithstanding the carriage being crowded, the passenger gets into it and falls off the train, such an event cannot be attributed to any negligence on the part of the railway. In such cases, the passenger, who acts illegally by entering in the compartment which is overcrowded, would be guilty of negligence. It was submitted that though, looking to Section 63 read with Section 109 of the said Act, it cannot be denied that the railway was required to prescribe the maximum capacity of the compartments for accommodating the passengers, infringement of that requirement would be an illegality committed by the passenger concerned by getting into the compartment which is overcrowded. The learned counsel argued that every illegality is not necessarily negligence and that negligence is a concept of common law having its ramifications which are de hors the statutory provisions. The learned counsel contended that the ground reality was known to the deceased passenger that the train was overcrowded. He submitted that it was not the liability of the railway to control such overcrowding. Moreover, the railway could not have foreseen that the doors of the

compartment would be open and that a passenger would be pushed out from a crowded compartment. It was also contended that assuming that there was overcrowding in the compartment, the further question that would arise was whether that negligence was a direct and immediate result of any act or omission of the railway. He submitted that negligence must be the immediate and proximate cause of the occurrence and that, in the present case, the immediate cause of the death of the passenger was not overcrowding of the compartment, but was pushes given by other passengers who had overcrowded the compartment which had resulted in this passenger being thrown out of the compartment. It was contended that the railway administration was not responsible for any such action on the part of the other passengers and could not have foreseen the same. According to the learned counsel, the incident occurred because of the intervening event of pushes given by other passengers and was not due to any negligence on the part of the railway even if there was any overcrowding of the compartment from which the passenger was thrown out. The learned counsel finally argued that even if the railway was held to be negligent, there was contributory negligence on the part of the passenger by getting into an overcrowded compartment.

6.1 The learned counsel, in support of his contentions, relied upon the following decisions :

[a] The decision of the Bombay High Court in Shankar Narayan v. The Barsi Light Railway Co. Ltd., reported in 49 BLR 178, which was rendered in the context of Section 67 of the said Act, was cited for the proposition that the contract evidenced by the sale of the third class ticket to the plaintiff was subject to the provisions of Section 67 of the Act, and that if there was no regular third class compartment to be offered to the plaintiff, his only remedy was to refuse to travel by the Pilgrim Traffic Vehicle and ask for a refund of the fare under sub-section (2) of Section 67 of the Act. The learned counsel pointed out from this decision that the Court had referred to the decision of Jones v. Great Northern Railway Company, in which it was held that the only duty of the companies was to give such accommodation as they could and the passenger had no legal ground of complaint for inconvenience or discomfort from overcrowding. The High Court held that there was no complaint to any of the Station Masters that the wagon in

which he was sitting was overcrowded. It was also held that the argument that as the maximum number of passengers was not fixed, the plaintiff could not prevent other passengers from entering into his vehicle as he could have otherwise done under Section 109 of the Act, had a good deal of force, but it was of no avail to the plaintiff, because, the Assistant Station Master had deposed that the vehicle could easily accommodate 45 persons and was not overcrowded.

[b] The decision of the Privy Council in East Indian Railway Company v. Kalidas Mukerjee, reported in (1901) A.C. 396, was cited for the proposition that there was no obligation on the part of the railway to carry the passengers safely. In that case, the respondent had sued to recover damages for loss of his son, who died from the effect of burns received in a fire which took place in a railway carriage in which he was travelling as a third class passenger. It was held that the railway company was not liable for damages unless guilty of negligence in permitting the fireworks to be brought into the carriage. As it was not the duty of the company to search ever parcel carried by a passenger, the onus was on the plaintiff to show that the parcels containing the fireworks suggested danger. It was held that the railway companies were bound to use proper care and skill in carrying their passengers: they are not liable as common carriers of passengers independently of negligence. The distinction was made between an obligation to carry with reasonable care and diligence and the obligation to carry safely.

[c] The learned counsel relied upon paragraph 73 in Chapter 3 of Charlesworth on Negligence (5th Edition), particularly to the observation that if a damage is not of the kind that was foreseeable the law will not provide any remedy.

7. The evidence on record clearly discloses that the train in which Jitendrakumar entered the compartment was already overcrowded right from the earlier stations. Witness Jagdish Nandi in his deposition exh.31 has stated that he got into the Saurashtra Express on 30-4-1979 at Navsari station with great difficulty. There was so much rush in the compartment that he could only go upto three feet from the entrance of the compartment. The Saurashtra Express was already overcrowded when it

reached Navsari railway station and there was no seat available in the train. Passengers were standing in the corridors and in the gangways between the compartments and on the buffers. They were also standing on the foot-boards. The train then proceeded to Maroli and at Maroli, Jitendrakumar had got into his compartment with great difficulty. Rekhaben, who came with Jitendrakumar and whom he casually knew, told him that Jitendrakumar was to go to Ahmedabad. This witness has stated passengers were getting in the compartment from both the front and rear entrances. There was much jostling done by them. Jitendra was a couple of feet away from where this witness was standing. The train halted only for two minutes at Maroli station and while the train was moving, the pushes continued. The passengers were giving pushes from the back, as a result of which, Jitendrakumar got severely pushed. He tried to hold the rod, but he could not keep his hold and was thrown out of the train and was hit by an electric pole. This witness has stated that there was commotion and he had seen some persons pulling the chain, however, the train did not stop. People were shouting that a person had fallen down. The train, however, kept on moving and stopped only at Udhna station. He has stated that the electric pole was two and a half or three feet away from the train and there was a danger of a person standing on the foot-board being hit by such electric pole. There is hardly any effective cross-examination of this witness on the material part of his deposition about the overcrowding of the train before it came to Navsari and thereafter. There is also hardly any effective cross examination of this witness having seen Jitendrakumar being thrown out of the train due to the rush of passengers who gave pushes from the back and about the fact that Jitendra on being thrown out dashed against the electric pole which was hardly two and a half or three feet from the train. The train did not stop despite the commotion and pulling of the chain. There is absolutely no reason to disbelieve the version of this witness about the state in which the train was moving from Navsari with passengers overcrowding it and standing in the gangways and in the corridors and about the rush in the compartment from the rear door as a result of which Jitendrakumar was pushed off the compartment and had died.

7.1 Other two witnesses Pushpaben and Rekhaben have also in their depositions at exh.27 and exh.30 clearly stated about the extraordinary rush of passengers and the overcrowding of the train with the passengers standing in gangways, corridors and hanging on the foot-boards. From Rekhaben's evidence, it is clearly established that

Jitendrakumar with great difficulty got into the compartment in which witness Jagdish Nandi was there. The ticket exh.20 which was recovered from the dead body of Jitendrakumar was proved in the evidence of Pushpaben, widow of the deceased. In the cross-examination of these witnesses, the railway administration itself suggested that there was overcrowding of the carriages in the said train. The trial Court, therefore, rightly came to a finding that the evidence disclosed the fact that the train by which Jitendrakumar was travelling was overcrowded with passengers and that the passengers were standing in corridors, gangways and on the foot-boards near the doors of the compartment. Surprisingly, however, the trial Court observed in paragraph 7 of the judgement that it was not believable that the deceased was standing inside the compartment and was pushed out of the compartment by the passengers trying to get in from the other side of the compartment. This, the trial Court, held by faulty reasoning : "If that be so, it would not be only the deceased who would be pushed out, but it would be the whole lot of passengers standing near the door on the other side who would be pushed out". The trial Court concluded that the deceased Jitendrakumar was standing near the door of the compartment and was "probably on the foot-board" and had been trying to get in the compartment but failed to get in and was thrown out of the compartment after the train travelled some distance from Maroli railway station". This finding of the trial Court is purely conjectural and contrary to the positive evidence on record that deceased Jitendrakumar got pushed by other passengers who entered from the rear and he could not hold on to the rod due to the severe pushes and fell out of the compartment. We are satisfied from the evidence on record that it was not by standing on the foot-board that Jitendrakumar was hit by the electric pole and died, as held by the trial Court, but it was after he got into the compartment and the train was moving that he, due to the severe pushes given by other passengers, was thrown out of the compartment and dashed against the electric pole while the train was moving, resulting in his death.

8. Overcrowding of trains run and controlled by the respondent - railway administration seems to have been taken by the administration itself as an accepted norm. This is clear from the suggestion made in the cross-examination of witnesses on behalf of the railway administration itself that the trains were overcrowded. The Station Master - Jamnadas, in his deposition at exh.33, has stated that he was the station master at Sachin station. The railway did not even care to examine

the station master of Maroli station. The station master of Sachin stated in his cross-examination that he was serving for 15-1/2 years in the railway and that the passengers used to travel standing on the roofs, gangways and buffers. He has stated that the passengers were never denied tickets by the railways. In paragraph 4 of his deposition, he has stated that he had no idea as to what was the capacity of the carriages and how many passengers could get into a carriage. He has admitted that a passenger having a ticket would be a bonafide passenger, but has stated that the railway was not liable to provide him a seat. He has stated that the passengers travel by holding rods and by standing on the foot-boards. He has stated that he had seen the deadbody of deceased Jitendrakuamr which was brought to Sachin station.

9. The question arising for our consideration is whether, by issuing excess tickets and allowing the compartments to be overcrowded, the railway administration can be said to be guilty of negligence so as to raise a tortious liability in the event of a passenger falling off an overcrowded compartment and receiving personal injuries, that, in the present case, resulted in death. The contention that the railway was not concerned with the safety of the passengers, and that there was no liability on the part of the railway to control the overcrowding, runs contrary to the statutory provisions and the guidelines relating to the running of the passenger trains. The fact that safety of persons travelling by railway is considered to be of paramount importance, is reflected by various provisions of the said Act, more particularly the provisions of Sections 101, 128 and 129 thereof. Under Section 101, if a railway servant, when on duty, endangers the safety of any person by disobeying any general rule made, sanctioned, published and notified under the Act, or, by disobeying any rule or order which is not inconsistent with any such general rule, and which such servant was bound by the terms of his employment to obey, and of which he had notice, or by any rash or negligent act or omission, he shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to five hundred rupees, or with both. Under Section 128 of the Act, endangering or causing to be endangered the safety of any person traveling by railway, by any unlawful act or by any willful omission or negligence, is an offence punishable with imprisonment for a term which may extend to five years. Endangering safety of persons travelling by railway by rash or negligent act or omission is also an offence under

Section 129 of the Act, for which the person committing the offence may be punished with imprisonment for a term which may extend to one year, or fine, or both.

9.1 The anxiety of the legislative provisions governing the working of these trains, for the safety of the passengers is evident even from the rules which have been framed under Section 47 of the said Act. The responsibility of the Station Master before giving permission to start the train as provided under Rule 114 is of mandatory nature and the Station Master is required to see before he gives the Guard permission to start a train that "all is right" for the train to proceed. It is obvious that all cannot be right for the train to move when the passengers are standing on the gangways or the buffers or by standing on the foot-boards. The guard in charge of the train shall not given the signal for starting the train from a station at which it has stopped until he has received permission from the Station Master and until he is satisfied about the safety of the passengers, as provided by Rule 115. Under Rule 115(b) of the said Rules, it is provided as under :

> "115 (b). The Guard in charge of a train with passenger vehicles attached shall not give the signal for starting until he has satisfied himself that no passenger is getting into or out of the train, that no person is riding outside a carriage, and that, except in accordance with special instructions, no person is travelling in any compartment or vehicle not intended for carriage of passengers."

9.2 Thus, if passengers are riding outside a carriage by standing on the foot-boards, holding the entrance rods or are standing in the gangways or if the passengers are still getting into or out of the train, as was in the present case, where the passengers were entering the compartments even while the train moved, it was the duty of the guard not to give the signal for starting the train. The guard is in charge of the train in all matters affecting stopping or movement of the train for traffic purposes, as provided by Rule 95. As per Rule 96 of the said Rules, when a train is within station limits, the guard shall be under the orders of the Station Master. Under Rule 102, the guard is required to have equipments mentioned therein while on duty with his train, which includes a whistle, a hand signal lamp and flags. All the precautions and the duties which are specified under the Rules aim at safety of the

passengers. Even during the journey including halts at stations, every guard is required to keep a good look out and satisfy himself from time to time that the train is proceeding in safe and proper manner during the journey including the halts at stations, as provided by Rule 121. Under Rule 138, every guard shall give his best assistance to passengers entraining and detraining. Rules 163 imposes a duty for securing safety of the public on every railway servant.

9.3 In the face of all these statutory provisions in the Act and the Rules, it is too late in the day for the railway administration to contend that it is under no obligation to carry the passengers safely. The ratio of the decision of the Privy Council in East India Railway Company (supra) is in the context of the distinction that their Lordships made between the duty of the railway companies to use proper care and skill in carrying their passengers and the obligation of railway company to carry safely and it was held that the railway company was not liable as common carriers of passengers independently of negligence. Moreover, their Lordships were not concerned with specific statutory provisions showing highest concern for safety of passengers as are reflected in our law. Therefore, the ratio of the decision in the East India Railway Company case cannot assist the respondents.

10. The contention of the railway administration that it was not obliged to provide any accommodation just because the ticket was purchased by a passenger, and that the passenger could have returned the ticket and claimed refund in view of the provisions of Section 67 of the act and no tortious liability can arise in respect of such a passenger who chooses to get into a crowded compartment mixes up the concept of liability founded on contract and the liability founded on tort. On purchase of the ticket, as per Section 66(1) of the Act, the passenger enters into a contract with the railway administration for his carriage in the train for the destination shown in the ticket in the class of carriage specified therein. The payment of fare may be regarded as the price for option to acquire the ticket, but that option was not to acquire a mere piece of paper. It was an option to acquire the document of entitlement to be carried on the terms agreed. However, since the ticket was deemed to be issued, subject to the condition of there being room available in the train, the passenger, on finding that room is not available in the train, can return the ticket within three hours after the departure of the train for which the ticket was issued, as provided by Section 67(2) of the Act. Therefore, if the next train available is beyond three hours after the departure of the train for

which the ticket was issued and the passenger waits, he will not be in a position to get any refund, should he again not get the accommodation in the next train, nor will he have any contractual right to get the accommodation when there is no room available in that train. The passenger will not be able to sue the railway for breach of contract of carriage in view of Section 67(1) of the Act if no room is available for him in the train; and that is the ambit of Section 67. This provision does not address any tortious liability that may arise on the part of the railway and reliance thereon on behalf of the railway for contending that the railway is not liable in tort to a passenger who is not provided accommodation, is wholly misconceived.

10.1 The passenger who is issued ticket has no means of knowing what will be the position of the availability of the room in carriages of the train in which he proposes to travel by an unreserved compartment. If at all, it will be the railway officer issuing the ticket who would be in a position to know through the station master of that railway station as to what will be the rush in the incoming train and he would also know the number of tickets already issued for that train to the passengers who want to travel by it from such issuing station. The passenger, buying the ticket, is not informed as to what will be the rush in the incoming train and how many tickets are already issued. Therefore, there is no scope at the time of purchase of an unreserved ticket for the passenger to agree to any peril during the travel or to be warned of such peril. The position at that stage is purely contractual so far as the purchase of ticket by the passenger is concerned and the passenger is neither aware nor concerned with incessant issuance of unreserved tickets irrespective of the capacity of the train and the crowds that such irresponsible issuance of tickets will generate.

10.2 The passengers buying unreserved tickets for travelling in the train have no control over the duration of the halt, which in the present case was just two minutes, for the 15 Down Saurashtra Express, at Maroli. In those two minutes, will it be reasonable to expect the passenger to check up all the unreserved compartments and find out the carrying capacity of each, which is statutorily required to be written on the compartment or inside the compartment, and make on the spot calculation whether there are excess passengers, particularly when some may be moving or standing, and, after such elaborate inquiry, decide what to do, which compartment to get in, or to opt for returning the ticket. An average type of

passenger would try to get inside some compartment or the other on the strength of his ticket, and he will be in a position to travel even if the compartment already contained the maximum number of passengers fixed, unless required to leave by any railway servant, as provided in Section 109 of the Act. It is only when such passenger refuses to leave the compartment when asked by any railway servant that he commits an offence under Section 109(1) punishable with fine of Rs.20=00. In other words, there is a scope for a passenger who enters a compartment, which already contains the maximum number of passengers exhibited thereon under Section 63 of the Act, to travel in the train, if he is not required to leave the compartment by any railway servant. If the passenger who is required to leave the unreserved compartment having the maximum number of passengers by a railway servant refused to leave, he may be forcibly removed under Section 109 of the Act. Thus, the railway servant has a duty to remove a passenger who is in excess if he refuses to leave the compartment. The requirement of fixing the maximum number of passengers for each compartment and to exhibit such number in a conspicuous manner inside or outside each compartment under Section 63 and the liability of the railway under Section 93, if the requirement of Section 63 is contravened, are a clear pointer to the fact that it is the obligation on the railway administration to ensure that unreserved compartments do not contain more than the fixed number of passengers, and if they get into such compartment, the concerned railway servant is empowered to require the excess passengers to leave the compartment or to remove them under Section 109 of the Act. It is the railway that regulates the running of the trains and if it allows the compartments to get overcrowded by failing to regulate the flow of the passengers, the neglect in discharge of its duties would entail tortious liabilities for the resultant harms that it can reasonably foresee.

10.3 When the railway carriages are overcrowded and the passengers are riding on the foot-boards of the compartments and are still trying to get into the compartments, pushing other passengers of the compartment at the time when the train is about to move, the Station Master acts in gross negligence in the discharge of his duties if he permits the Guard to start the train, because, Rule 114 of the General Rules framed under Section 47 of the Act provides that it is the responsibility of Station Master to "see before he gives guard permission to start a train that all is right for the train to proceed". The Guard in charge of the passenger train is enjoined with a duty that he "shall

not give the signal for starting until he has satisfied himself that no passenger is getting into or out of the train, that no person is riding outside a carriage ..... ", as laid down by Rule 115(b) of the General Rules.

10.4 The evidence on record of the present case shows, without any dispute, that the train was overcrowded and the passengers were still trying to get in when it started moving, and that many passengers were on the foot-boards of the compartments and hanging by holding the entrance bars and some were even standing on the buffers and in the gangway of the carriages. That the railway staff has become insensitive to their duties and has allowed this to happen for a long time, will not reduce the seriousness of the breach of duties so blatantly committed. The matter was taken so casually by the railway administration that, in the court proceedings of the suit, the railway administration did not even care to examine the Station Master of Maroli, who was on duty, or the Guard who was in charge of the train, or any other official from Maroli station, who had attended the duty in connection with the 15 Down Saurashtra Express on that day. The railway administration, instead, put the Station Master of Sachin as its witness to tell the Court that he had no idea of capacity of coaches, and that, for years, he had witnessed the passengers travelling on the roofs of the carriages, standing on the buffers and in the gangways and on the foot-boards and holding rods of the carriages hanging outside the compartment (See paragraphs 3 and 4 of the deposition of the Station Master Jamnadas exh.33).

10.5 The railway administration has adopted certain norms to be followed by its employees and some of them are in the Operating Manual, which was placed before us. Amongst the additional duties of the Guard, is the duty while working a passengers train that, during the course of the journey, the Guard should, inter alia, "look after the safety and comfort of passengers, more particularly, of women and children and assist them when getting in and getting out (para 1011(2) of the Operation Manual). As noted above, even under Rule 138 of the General Rules made under Section 47 of the Act, every Guard shall give his best assistance to passengers entraining and detraining. This at once creates a duty to ensure care of passengers when they try to get out of the compartment or get into the compartment for the journey. This basic duty is flouted and the Guard in the present case allowed the train to move when the passengers in the unreserved compartments and those wanting to travel were in turmoil

and in need of guidance and help within the two minutes of halt where they could not have coolly dealt with the perplexing situation created by the railway administration itself by endlessly issuing the tickets and allowing the coaches to become overcrowded, not bothering to remove the excess passengers and to observe the passenger-capacity of the coaches proclaimed under Section 63 of the Act. we were told by the railway counsel that the maximum passenger capacity of the coaches was eighty. Depending upon the type of coaches, the passenger capacity was fixed and this was shown to us from the Appendix "D", Table-2 "Coaching Stock - Broad Guage" from the Operating Manual. The learned counsel for the railway administration lamented that if these rules are enforced, then no train can move. We are aghast at the insensitiveness of the railway administration towards its prescribed duties and hold, on the basis of the evidence on record, that the railway administration failed in its duty to regulate the passengers in-flow in the compartments and acted with gross negligence in allowing the train to move when it was overcrowded and passengers were still trying to get in and many were travelling by standing on the foot-boards or were hanging by the rods and also standing on the buffers and in the gangways. The negligence of the defendant - railway was compounded by its issuance of excess unreserved tickets endlessly and by the omission of the Station Master of Navsari to inform the stations ahead about the overcrowding of this train in accordance with paragraph 1023 of the Operating Manual, which provided as under:

"1023. Overcrowding on Trains: When there is overcrowding in any particular class of accommodation on a train, the Guard must inform the nearest Station Master who shall inform the Section Controller and the stations ahead. The Section Controller should refer the matter to the Divisional Operating Superintendent and the Divisional Commercial Superintendent for such orders as they may consider necessary, and also inform the large stations and junctions ahead, where heavy booking of passengers generally takes place. The Station Masters receiving information should warn the passengers at their stations, but issue of tickets should not be withheld until specific instructions to this effect have been received from the Divisional Operating Superintendent or the Divisional Commercial Superintendent. For clearing excess passengers, such standing instructions as issued from time to

time in regard to attaching of extra carriages to the same train or to another train, etc. may be observed. On non-Controlled section orders of the Divisional Operating Superintendent and Divisional Commercial Superintendent should be obtained through telegraph and the junctions and important stations enroute should also be informed."

10.6 These instructions were grossly ignored and neither the Station Master nor the Section Controller nor Divisional Operating Superintendent or the Divisional Controller did anything to warn the passengers or to consider withholding of issuance of excess tickets which could have been done by the Divisional Superintendent or the Divisional Commercial Superintendent by issuing necessary instructions. This guideline is precisely meant for stopping uncontrolled and excessive issuance of tickets to the passengers when the train in which they want to travel is not having sufficient accommodation for them. The neglect of duty has been colossal and all the regulatory norms for safety of passengers and their travel have been openly flouted by the railway staff in the present case.

11. It was argued on behalf of the railway administration that even if the overcrowding of compartments of the train in which the deceased travelled was considered to be due to negligence on the part of the railway staff, such overcrowding was not the immediate or proximate cause of the accident and that the unfortunate passenger was thrown out of the compartment due to pushes given by other passengers who are said to have entered from the rear door. According to the learned counsel, the railway could not have foreseen that other passengers overcrowding the compartment would give such pushes, and that, the intervening fact of jostling and pushes was the proximate cause of the incident of the passenger Jitendrakumar being thrown out of the moving train.

11.1 The deposition of witness Jagdishbhai, at exh.31, establishes that the passengers, who continued to get into the compartment when the train started moving, gave pushes and due to their jostling, Jitendrakumar was pushed near the edge of the door and since he could not hold on the rod, due to severe jostling by other passengers, he was thrown out of the train and dashed against the electric pole (paragraph 4 of his deposition). These facts are utilized by the railway administration for contending that, it could not have foreseen that, in a train run and regulated by it,

throughout its journey and which was running overcrowded and for which the tickets were still being issued to add to such overcrowding, it could not have known or foreseen that the passengers in their anxiety to get into the overcrowded compartments in a couple of minutes' halt, which gave them hardly any time to take any cool and calculated decision or to think about their options, would jostle and push their way in the compartment unless stopped by the railway servants. Any officer of the railway, who was in charge of the working of this passenger train and more particularly, the Station Master and the Guard, would have easily foreseen the consequences of allowing the passengers to forcibly get into the already overcrowded compartments, and permitting the train to move with more passengers still trying to get into the compartments only shows a total disregard for the duties of the Station Master, the Guard and other concerned staff who were responsible for regulating and controlling this passenger train at Maroli. Their callous disregard for the safety of the passengers brought about a situation where the passengers getting into the train when it had started moving, jostled for a foot-space in the compartment and in the process, pushed other passengers to squeeze in, resulting in Jitendrakumar being pushed to the edge of the door and being thrown out of the compartment. The situation in which the passengers could, without being stopped, get in the overcrowded compartment, and were continuing to get in when the train was permitted to move, brought about by the negligence of the employees of the railway, was the proximate cause of the incident which could have been foreseen by the Station Master, Guard and other concerned officials in charge of the train and its movements.

12. It was not reasonable to expect the passengers holding unreserved tickets and eager to get into the train during its brief halt to check up each compartment of the train to find out accommodation within a span of two minutes. The anxiety of an average passenger would be to get into the coach when there is no regulatory mechanism posted for preventing excess entry in the coaches. The railway should be aware that passengers do and would try to enter unreserved coaches when, as admitted, there was a great rush and overcrowding of coaches. This was clearly foreseeable and its consequences were obvious. The danger of passengers falling off from an overcrowded carriage was real and could easily be foreseen. It was the duty of the railway administration to regulate the movement of the passenger train in a way that personal safety of the passengers was not endangered. Reckless issuance of unreserved tickets

with total disregard for the capacity of coaches statutorily fixed and written thereon as required by Section 63, and permitting the train to move with overcrowded compartments in which the passengers were still trying to get in and when passengers were hanging outside the compartments by holding the rods, riding on foot-boards and standing in the gangways on the buffers, was solely responsible for the resultant throwing out of the passenger who could not withstand the jostling of others and was pushed out of the compartment. There was a real risk of injury if the train was permitted to start with overcrowded coaches with passengers standing on foot-boards, hanging by the rods and standing on the buffers and in the gangways, and it was the duty of the railway staff, particularly the Station Master and the Guard to take steps to eliminate the risk before the train was permitted to move. There was a duty to take precaution of not issuing the tickets far in excess of the capacity of coaches and not allowing the train to move before eliminating the risk of injury to the excess passengers clinging to the coaches on foot-boards and jostling their ways in the compartments, which might have averted the risk. It is not the duty of passengers to regulate entry in the coaches and it is for the railway staff to regulate such entry, when it is armed with power to prevent excess entry and even to remove the excess passengers who refused to leave the compartment as contemplated by Section 109 of the Act. Action of the passengers of getting into the coach with ticket was in the ordinary course of things and, at least generally speaking, not blameworthy. Intervention of the voluntary act of passengers to get into overcrowded compartment did not in itself have the result that the injuries were not caused by the negligence of the railway. The death of the passenger, in this case, was clearly the natural and probable result of the breach of duty on the part of the Station Master and the Guard in charge of the train.

12.1 In this case, even though the chain provided in the compartment was pulled at the time when the passenger was thrown out of the compartment, the train was not stopped. This shows either that the communication cord was not working or the pulling of the chain was ignored by the Driver and the Guard. The Guard did not even notice that the passenger had fallen off the compartment as the train passed by.

12.2 In Summer v. Salford Corporation, reported in (1943) AC 283, at page 296, Lord Wright said that, "If a plaintiff suffers damage by the defendant's default, the damage may be directly due to that default and

recoverable even though the accident and damage would not have happened but for some action of the plaintiff, so long as his action was in the ordinary course of things and, at least generally speaking, was not blameworthy." The effect of the intervening action of a third party was discussed in Dorset Yachet Co. Ltd. v. Home Office reported in (1970) AC 1004, and in the course of that discussion, Lord Reid cited the following passage from Haynes v. Harwood, reported in (1935) 1 KB 146 at page 156 :

> "If what is relied upon as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether or not .... the accident can be said to be the natural and probable result' of the breach of duty".

12.3 The railway has a duty to protect its passengers from other travellers and such duty is implied from the contract of carriage and stems from the control of the carrier. The railway has sufficient authority and ability to control the conduct of the passengers and passenger - carrier relationship imposes a duty on the railway to control the conduct of the third party to prevent them from causing injury to others. A carrier must take reasonable cognisance of the habits, customs and practices followed generally by its passengers in so far as these actions pose hazards to its business invitees; and with an awareness of these hazards, it must take reasonably appropriate steps to avoid or minimize the likely harm. The obligations assumed by the defendant railway administration were sufficient to establish the requisite relationship from which the defendant's duty to prevent harm to passengers by jostling of other passengers resulting from the overcrowding arose. It is not necessary to show that the particular accident that occurred was foreseeable, any more than it is necessary to show that the particular damage was foreseeable; it is enough that if it was reasonable in a general way to foresee the kind of thing that occurred. (See Salmond and Heuston on the Law of Torts, 12th Edition, at page 233). If it were necessary for the plaintiff to prove that the defendant ought to have foreseen the particular harm which in the event occurred, few actions for negligence will be successful (ibid).

12.4 The overcrowding of the unreserved compartments

of the train was the direct result of issuance of tickets by the defendant far in excess of the capacity of coaches and inaction in preventing overcrowding of the compartments by the defendant which was in the control, charge and management of the train. It is sufficient to show that such overcrowding of compartment or carriages was, according to common experience of mankind, likely to result in "just the kind of thing which was likely to happen". If what is relied upon as novous actus intervenie is the very kind of thing which is likely to happen if want of care which is alleged takes place, the principle embodied in the maxim is no defence (Greer LJ in Haynes v. Harwood (1935) 1 KB 146 - 156 also cited by Lord Reid in Dorset Yacht Co. (supra) in Presiand v. Hunter Area Health Service (2003) NSWSC 754 (paragraph 163).

12.5 The damage done in this case was due to the want of care on the part of the defendant resulting in overcrowding of the carriage in which the conduct of the passengers was foreseeable, and that very thing which happened for want of care cannot be used as a defence, because, the damage which was foreseeable or probable consequence of defendant's wrong doing is imputable to him notwithstanding the intervening act of the conduct of passengers pushing their way in the crowded compartment. The category of persons and their interest in contemplation of the defendant railway determined the existence of a duty of care, particularly when the statutory and administrative guidelines were laid down for maintaining the high standards of duty to take care for the safety of the travelling public. What a person is capable of foreseeing, what is reasonable to require a person to have in contemplation, and what kinds of relationship attract a legal obligation to act with reasonable care in the interest of another, are related aspects of one problem. The concept of reasonable foreseeability of harm and the nature of relationship between the parties are both relevant as criteria of responsibility. The defendant should have foreseen that a person, such as, the deceased passenger was likely to be pushed out of the compartment and injured while the passengers with unreserved tickets continued to enter the overcrowded compartment, if the train was permitted to move.

13. For the reasons indicated above, we reverse the findings of the trial Court on Issues Nos. 3 and 6 and hold that the death of the passenger Jitendrakumar Somchand Shah was caused because of the negligence and carelessness of the defendant - railway authority and not

on account of any negligence on the part of the deceased passenger. We also hold that, notwithstanding the fact that accommodation cannot be claimed as a mater of right on the basis of an unreserved ticket, as provided by Section 67, that contractual term did not have the effect of diminishing any tortious liability for the negligence of the railway administration, resulting in the overcrowding of the carriages and in permitting the overcrowded train with passengers hanging outside the compartment and attempting to get in, to move before eliminating the likely risk of injury to the passengers which could be obviously foreseen by the officials in charge of the management, control and movement of the passenger train.

13.1 The appellants-plaintiffs are, therefore, entitled to claim damages in respect of the loss of life of deceased Jitendrakumar which resulted due to the negligence of the defendant railway. There is reliable evidence of witness Pushpaben, widow of the deceased, exh.27, on record, showing that Jitendrakumar was a healthy person of 40 years of age and was earning Rs.750=00 per month from two part-time jobs (Rs.400 per month and Rs.375 per month as per certificates exhs. 28 and 29). Keeping in view the earning of the deceased at the time when he died and his age and state of health, the global figure of Rs.1,20,000=00 claimed by way of damages was wholly justified and reasonable. We, therefore, reverse the finding of the trial court on Issue No.4 and hold that the appellants - plaintiffs are entitled to get Rs.1,20,000=00 as damages from the defendant railway for the loss to them due to death of Jitendrakumar. The appellants are also entitled to get interest at the rate of 6% from the date of filing of the suit till the realization of the amount, as claimed.

14. We, accordingly, set aside the impugned decision of the trial Court and hereby decree the suit by directing the defendant railway to pay the appellants -plaintiffs Rs.1,20,000=00 (Rupees one lac twenty thousand only) with interest at the rate of 6% per annum from the date of the filing of the suit till the realization of the amount by the appellants - plaintiffs. The appeal is accordingly allowed with costs.

[R.K.ABICHANDANI, J.]

[D.H.WAGHELA, J.]

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